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No. 484

In the Supreme Court of the United States

OCTOBER TERM, 1961

ROBERT J. BLAUNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 42–71) is reported at 293 F. 2d 723.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1961 (Pet. 72), and a petition for rehearing was denied on September 11, 1961 (Pet. 1). The petition for a writ of certiorari was filed on October 9, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support the verdict.

2. Whether the reading of the conspiracy count of the indictment by government counsel in his opening statement and by the trial judge in his charge to the jury constituted prejudicial error.

3. Whether the trial judge erred in denying a motion for a mistrial based upon a statement by government counsel in closing argument which the trial judge immediately directed the jury to disregard.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

18 U.S.C.:

SEC. 371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States,

> or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

Two counts of an indictment, returned in the United States District Court for the Eastern District of Missouri, charged petitioner (R. J. Blauner), his son (R. A. Blauner), and H. W. Stanhope with wilful attempted evasion of the income taxes of American Lithofold Corporation for the years 1950 and 1951. A further count charged the same defendants with conspiring to commit several offenses, among them defrauding the United States of the taxes of American Lithofold Corporation and of its right to have the functions of Internal Revenue Service employees performed free from corruption, dishonesty and fraud. (R. 3–4; Tr. 12–26.)[1] The American Lithofold Corporation's reported and correct taxable income and tax liability, as alleged in the indictment, are as follows (R. 3–4; Tr. 12–13):

	Income		Tax	
	Reported	Correct	Reported	Correct
1950	$35, 035. 58	$134, 655. 13	$9, 964. 94	$55, 501. 28
1951	357, 650. 37	593, 127. 00	235, 577. 46	406, 698. 18

[1] References to the original record will be designated "R." References to the trial transcript will be designated "Tr."

Since R. A. Blauner had taken up residence in Cuba and was never apprehended under the indictment, the court ordered a severance of the charges as to him. (Tr. 4, 452, 523.) The 1950 substantive count was dismissed on the ground that it was barred by the statute of limitations. (R. 143–145, 178–181.) After a jury trial, petitioner was convicted on the two remaining counts, and Stanhope was acquitted. (Tr. 805.) Petitioner was sentenced to imprisonment for 30 months and fined $10,000. (R. 194.)

The evidence to support the verdict may briefly be summarized as follows:

American Lithofold, which was engaged in the manufacture and sale of business forms, was controlled by petitioner. (Tr. 247, 279, 443, 448, 512, 513, 520, 580, 589–590.) American Carbon Paper Corporation, also controlled by petitioner (Tr. 81–82, 196–199, 204–206, 564–565, 590–593), manufactured and sold carbon paper, about 85% of its product being purchased by Lithofold. (Tr. 82–83.) Petitioner's son, R. A. Blauner, who was designated on the books of Lithofold as its representative in the eastern part of the country, received "commissions" of $3,000 a month which were raised to $4,000 a month in the latter part of 1951. (Tr. 231, 251, 397–401.)

Sometime in 1950, petitioner informed officials of both American Lithofold and American Carbon that it would be necessary to pay additional "commissions" in order to enable Lithofold to obtain certain government contracts. (Tr. 196–199, 204–207, 564–565, 580–581.) He directed that the price paid by

Lithofold to Carbon for materials be increased by six percent, and that five-sixths of this increase be passed on by Carbon to Jersey Coast Sales Co. (Tr. 196, 204, 513–514, 580–581.) Lithofold's books and returns showed these payments as part of cost of materials. (Tr. 171–172, 649–650.) Jersey Coast was an alleged partnership between petitioner's son, R. A. Blauner, and Karen Stewart, who testified at the trial that she did not recall anything at all about it. (Tr. 197, 417–418, 520.) Officials of Lithofold and Carbon were apparently aware of R. A. Blauner's connection with Jersey Coast (Tr. 197, 205–206), but they were not informed by petitioner who the ultimate recipients of the "commissions" were to be. (Tr. 580–581). James P. Finnegan, Collector of Internal Revenue at St. Louis, where Lithofold was located, was present when petitioner informed Lithofold officials of the necessity for the "commission" arrangement. (Tr. 545–546, 580.)

Petitioner asserted that this concealment of the excess commissions paid to his son was necessitated by the terms of a loan Lithofold had obtained from the Reconstruction Finance Corporation. (Tr. 565). However, the practice continued after the loan had been repaid. Petitioner explained that he did not know his way around Washington, whereas his son did, and this was the only way Lithofold could get the business. (Tr. 556, 565, 590, 597–598.) He and his son-in-law, Bridell, the president of American Carbon, compared their situation to the plight of steel companies forced to deal in the black market. (Tr. 514.)

During 1950 and 1951, R. A. Blauner received large

sums, over and above his regular $3,000 a month commission, through those transactions, as well as through a further arrangement whereby he was secretly paid half the commissions paid by Lithofold to its Washington representative, William J. Sims. (Tr. 211–226, 515–516.) Petitioner was well aware of the arrangement between his son and Sims. (Tr. 228–229.) However, the books of Lithofold revealed no evidence of sales to government agencies by R. A. Blauner. (Tr. 147.)

Late in 1950, R. A. Blauner told petitioner that he was having income tax problems, and it was decided that he would go to Cuba to try to develop business there for Lithofold. (Tr. 453–454.) The expenses of this Cuban office for the year 1951 were about $23,000, whereas the sales totaled less than $350. (Tr. 470, 562–563.) There was evidence that large personal expenditures by petitioner and his family had been claimed as business expenses of Lithofold. (Tr. 590–594). And there was further evidence that Lithofold had paid for the Florida vacation of G. E. Brown, an Internal Revenue Service employee, and his wife (Tr. 337–340), and that certain payments had been made to the local Collector of Internal Revenue, James P. Finnegan (Tr. 539–540, 543–546).[2]

The Government's expert accounting witness testified that, on the basis of the evidence of improper business expenses claimed in Lithofold's 1951 return, there was an income tax delinquency of substantially the amount alleged in the indictment. (Tr. 612–620).

[2] Finnegan was convicted of accepting bribes in an earlier prosecution in which Lithofold was involved. *Finnegan* v. *United States*, 204 F. 2d 105 (C.A. 8), certiorari denied, 346 U.S. 821, rehearing denied, 346 U.S. 880.

Petitioner did not take the stand and there was no evidence that R. A. Blauner had done anything to earn the large "commissions" which came into his hands. The defense relied on the fact that the 1950 payments to R. A. Blauner were disclosed to the Internal Revenue Service in December 1951, and on the fact that the accounting firm of Ernst & Ernst, which prepared Lithofold's 1951 return with knowledge of the payments to R. A. Blauner, still classified them as cost of materials.[3] (Tr. 645–652.) However, Ernst & Ernst added the following certificate to the return (Tr. 500–501, 505):

> This return was prepared generally without independent determination of the deductibility of certain costs and expenses.

And in the 1951 audit report submitted to Lithofold, Ernst & Ernst stated (Ex. 32; Tr. 461–463, 495–496):

> Commission expense includes amounts paid to certain individuals who are not credited with any specific sales on the company's sales record. Selling and general and administrative expenses include amounts which we are not yet able to pass upon as being ordinary and necessary to the successful conduct of the business.

ARGUMENT

1. There is no merit to the main contention of the petitioner (pp. 22–32), *i.e.*, that the evidence was insufficient to support the verdict. Petitioner contends that he could not have been guilty of wilful income

[3] Price-Waterhouse & Co., which had prepared the Lithofold returns in previous years, discovered the situation in 1951, insisted that a disclosure be made to the Internal Revenue Service, and then withdrew as accountants for Lithofold. (Tr. 511–525.)

tax evasion, because Ernst & Ernst made out the 1951 return with knowledge of the excess commissions paid to R. A. Blauner.

But petitioner was well aware that the Lithofold books disclosed no sales by R. A. Blauner to justify the commissions; he had been specifically warned that the payments to his son could be considered fraudulent (Tr. 518, 524); and he knew that Ernst & Ernst had made no independent determination of the deductibility of the payments and specifically disclaimed responsibility for the claimed deductions, both in their audit report and in the certificate to the return (*supra*, p. 7). As the Court of Appeals pointed out (Pet. 65):

> Appellant's reliance upon the employment of Ernst & Ernst and what is referred to as the latter's incorporation of its audit by reference is no shield. The statement or declaration attached to the income tax return executed by the auditor is little more than a disclaimer of responsibility for anything that might be wrong if something wrong were found. * * *

Petitioner's wilfulness was an issue of fact for the jury, and there was obviously ample evidence to support the jury's resolution of that issue adversely to petitioner.

2. Nor is there merit in the contention (Pet. 33–39) that the reading of the conspiracy count to the jury constituted prejudicial error. The reading of the indictment simply informed the jury of the precise nature of the charges. Before the government attorney read count 3 in his opening statement, the jury had been instructed by the court that this was merely a

statement of what the government proposed to prove (Tr. 8.) When the jury was instructed at the end of the trial, the court read the statutes upon which the prosecution was based, and then read the indictment in order to clarify in the minds of the jurors the nature of the charges against petitioner and the statutes upon which the charges were based. (Tr. 741–742, 743–756.) The court then instructed that the indictment constituted no evidence of any character in the case, raised no suspicion of guilt, and was not to be considered as containing or constituting any evidence whatsoever. The court specifically instructed the jury that the only function of an indictment is to identify the offense with which the petitioner was charged. (Tr. 757.) Under such circumstances, the reading of the indictment by the United States Attorney and by the court did not constitute error. *Stephan* v. *United States,* 133 F. 2d 87 (C.A. 6th), certiorari denied, 318 U.S. 781, rehearing denied, 319 U.S. 783; *Petrilli* v. *United States,* 129 F. 2d 101 (C.A. 8th), certiorari denied, 317 U.S. 657.

3. Petitioner's last contention (Pet. 39–41) is that the trial court erred in not granting a mistrial as a result of the prosecutor's remark in final argument that the commissions were either paid to R. A. Blauner as income, or were used to bribe government officials. The argument is without substance.

In the first place petitioner did not ask for a mistrial. Counsel for petitioner objected to the remark. Counsel for the co-defendant, Stanhope, then requested a mistrial, but counsel for petitioner did not join in the motion. (Tr. 732–734.) Moreover, the

trial court amply protected petitioner by vigorously admonishing the prosecutor, and by advising the jury that there was no evidence of bribery and that they should disregard the remark.

CONCLUSION

The decision of the Court of Appeals is correct, and no conflict of decisions or important questions of law are presented. The petition for certiorari should be denied.

Respectfully submitted,

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